



**U.S. Citizenship
and Immigration
Services**

(b)(6)

DATE: **JUN 10 2013** OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions with progressive post-baccalaureate experience equivalent to an advanced degree. The petitioner seeks employment as a mathematics teacher at the [REDACTED] a public high school in Baltimore, Maryland. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for the classification sought, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –

(A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer. –

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions with at least five years of progressive post-baccalaureate experience, which the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines as equivalent to a master's degree. (At the time she filed the petition, the petitioner had taken some graduate-level courses but had not yet received a graduate degree.) The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest

by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . .” S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (NYSDOT), 22 I&N Dec. 215 (Act. Assoc. Comm’r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term “prospective” is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on May 11, 2012. In an accompanying statement, counsel stated that the petitioner’s “petition for waiver of the labor certification is premised on her Masters Degree in Education and more than seventeen (17) years of inspired, innovative, and progressive teaching experience in both the United States and the Philippines.” Counsel also stated that the petitioner received “commendations for her novel, results-driven teaching strategies and dedication to her students, colleagues, and educator community.”

While counsel stated that the petitioner earned a master's degree, a credential evaluation in the record does not indicate that she holds such a degree. Instead, the evaluator concluded that the petitioner's progressive post-baccalaureate experience is equivalent to a master's degree, as provided under the regulation at 8 C.F.R. § 204.5(k)(2). Throughout the proceeding, counsel refers to the petitioner's "master's degree [and] over 17 years of experience" as though they were two separate things, when in fact the petitioner's experience serves in place of an actual master's degree.

Academic degrees, experience and institutional recognition (such as awards and commendations) are all elements that can contribute toward a finding of exceptional ability. See 8 C.F.R. § 204.5(k)(3)(ii)(A), (B) and (F), respectively. Exceptional ability, in turn, is not self-evident grounds for the waiver. See section 203(b)(2)(A) of the Act. Particularly significant awards may serve as evidence of the petitioner's impact and influence on her field, but the petitioner did not demonstrate the significance of the awards documented in the record. The documented awards are from various employers, reflecting contributions that the petitioner made within a given school system rather than across her profession. The best certificates establish a high level of professional competence. Others (such as a "Perfect Attendance" certificate) represent professional incentives that are not directly relevant to the petitioner's accomplishments as a teacher.

Counsel stated that the record contains a "Letter[] of Recognition . . . From [redacted]" The letter, dated May 4, 2010, reflected on the 2009-2010 school year, and contained no specific information about the petitioner. The general nature of the content suggests that the letter is a "form" letter sent to multiple recipients within Baltimore's public school system.

The petitioner submitted more personal letters from administrators, teachers, students and parents of students with whom the petitioner has worked. These letters praised the petitioner's abilities as an educator, but did not indicate that the petitioner's work has had or will continue to have an impact outside of the classrooms and local school systems that have employed her.

The director issued a request for evidence on September 5, 2012, stating: "The petitioner must establish that the beneficiary has a past record of specific prior achievement with some degree of influence on the field as a whole."

Much of the petitioner's response to the request for evidence concerned the intrinsic merit of mathematics education, which does not distinguish the petitioner from others in the same field. Current law provides no blanket waiver for math teachers, and therefore general assertions about the value of the profession cannot establish eligibility for the waiver. Other materials stressed the need for education reforms, but did not show what role, if any, the petitioner has played in implementing such reforms.

Counsel acknowledged that the director is "required by law" to follow *NYS DOT*, and presented "legal and factual premises" upon which to base "affirmative decisions without deviating from said precedent case." First, counsel stated that the Immigration Act of 1990 (IMMACT 90), which created the national interest waiver, "specifically stated – 'this bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with

new blood and new ideas.” The quotation does not come from the statute itself, as counsel indicated, but rather from comments made by then-President George H.W. Bush as he signed the legislation into law. IMMACT 90 included the waiver provisions, but it also specifically stated that members of the professions – including educators, scientists, and engineers – are generally subject to the job offer requirement. The president’s comments referred not to the waiver, but to “vital increases” in the number of immigrant visas made available to members of the professions – such visas typically made available through the job offer requirement, also enshrined in IMMACT 90. USCIS has never interpreted the statute as granting blanket waivers to scientists, engineers, or educators. The *NYSDOT* precedent decision denied the waiver to an engineer. Therefore, the president’s reference to “educators” in the same sentence as “scientists and engineers” does not establish or imply a presumption of eligibility for the waiver.

Counsel presented the following as a quotation from *NYSDOT*:

Supplementary information published at 56 Federal Register 60897, 60900 (November 29, 1991) states that the application of national interest **should be flexible as possible**, yet an alien seeking to meet the standard must make a showing significantly above that necessary to prove the ‘prospective national benefit’ as required of all aliens seeking to qualify as ‘exceptional.’

The above passage is not an entirely accurate quotation. The actual *NYSDOT* passage reads:

Supplementary information to Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”]

Id. at 217-18. In quoting the above passage, counsel emphasized the phrase “should be as flexible as possible,” while also quoting (but not emphasizing) the portion that stated that aliens seeking the waiver “must make a showing significantly above that necessary to prove the ‘prospective national benefit’” required under section 203(b)(2)(A) of the Act.

Counsel contended that USCIS must now exercise the required flexibility by considering newer legislation. Counsel stated:

Three (3) years after the AAO [issued the] *In the Matter of New York Department of Transportation* precedent decision, U.S. Congress put into law the No Child Left Behind Act of 2001. . . .

Through the No Child Left Behind Act of 2001, the United States Congress has in effect remarkably engraved the missing definition upon the concept of 'in the national interest,' which centered it on the 'Best Interest of American School Children.' More importantly, U.S. Congress also provided the means to achieve this now defined 'in the national interest,' i.e., 'Hiring and Retaining Highly Qualified Teachers.' . . .

With this, the Service now has a definite working definition of 'in the national interest' including the clear standard on what qualifications must be required from NIW teacher self-petitioners, as mandated by No Child Left Behind Act of 2001. There is no longer vagueness or obscurity like what happened in the New York State Department of Transportation Case, which left the Immigration Service with over-reaching discretion in imposing even the impossible from NIW teacher self-petitioners.

Counsel's analysis, above, rests on unfounded speculation. Counsel claims that, by defining the term "Highly Qualified Teacher" in the No Child Left Behind Act (NCLBA), Congress implied that any foreign teacher meeting that definition is entitled to a national interest waiver. The NCLBA, however, does not contain any immigration provisions that directly address the waiver. Counsel provided no example of legislation by which Congress meant to establish immigration policy without actually mentioning immigration. The unsupported assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

When Congress seeks to change immigration policy, it does so by passing immigration legislation, such as IMMACT 90 or section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95 (November 12, 1999). The latter legislation, passed in direct response to *NYSDOT*, specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to that Act, to create special waiver provisions for certain physicians. In doing so, Congress demonstrated that it has the authority to create blanket waivers, something that, to date, Congress has not done for teachers, "highly qualified" or otherwise.

Counsel claimed: "the USCIS-Texas Service Center is requiring more from the beneficiary's credentials and tantamount to having exceptional ability," even though one need not qualify as an alien of exceptional ability in order to receive the waiver. As noted previously, the threshold for exceptional ability is below, not above, the threshold for the national interest waiver, a point that counsel reiterated by quoting a portion of *NYSDOT* to that effect. The director did not require the petitioner to establish exceptional ability in her field. Instead, the director observed that the petitioner's evidence does not show that the petitioner's work has had an influence beyond the school districts where she has worked. *NYSDOT*, which neither Congress nor any court has overturned, does not require a strict showing of exceptional ability, but it does require "a showing significantly above that necessary to prove the 'prospective national benefit'" that all aliens of exceptional ability must demonstrate (even when their petitions include labor certifications).

Counsel listed previously submitted exhibits, which the director had already judged insufficient to establish eligibility, as well as new exhibits. The new exhibits include a May 2012 (no exact date specified) letter from [REDACTED] which, like the May 4, 2010 letter submitted previously, does not mention any specific achievement by the petitioner, and appears to be a "form" letter sent to Baltimore school employees.

Other witnesses provided new letters with the petitioner specifically in mind. Like the first group of letters, these new letters contained praise for the petitioner's skills, dedication, and character, but do not show that the petitioner's work has, on a national scale, arrested or slowed the decline in education which forms much of the basis for the waiver claim. The witnesses praised the petitioner's methods, but the record does not show that other schools are implementing these methods. Rather, the petitioner's impact appears to be limited to the school where she works.

In her own statement, the petitioner provided "a brief overview of . . . the [REDACTED] HIGH SCHOOL," which "caters [to] young adult residents of [REDACTED] . . . who left school and are at risk of dropping out [of] traditional schools." The petitioner stated that the [REDACTED] offers "an Alternative Option Program (AOP) to help each and every young adult finish high school by getting a diploma through Maryland high school requirement[s] or GED" (General Educational Development). Such schools are important because they give disadvantaged students a second chance at a basic education, but it does not follow that teachers at such institutions are entitled to a blanket waiver of the job offer requirement.

The petitioner stated that she is "planning to continue [her] master's degree in special education," and "to pursue [a] PhD (Doctor of Philosophy) in Statistics and Research to be able to conduct a study that will focus on helping young people to succeed." The petitioner's future plans cannot establish a past record of impact and influence on her field.

Also submitted, without further comment, was a copy of a May 9, 2012 electronic mail message from the "Human Capital International Support Team." The message reads, in part:

As per the guidelines established by the U.S. Department of Labor, the district has completed the federally mandated market test. . . .

Your certification area passed the market test and you have been selected for sponsorship for permanent labor certification as a Mathematics Teacher. . . .

Human Capital staff will follow up with you regarding next steps in the PERM application process in May, 2012.

The above message indicates that the petitioner's employer intends to apply for labor certification on her behalf, and (upon approval of the labor certification) file an immigrant petition on her behalf. The date of the message, May 7, 2012, is four days before the petition's filing date, meaning that the petitioner was aware of her employer's intent as of the petition's filing date.

Even though the petitioner showed that her employer intends to seek labor certification, counsel asserted the “tedious process of labor certification will delay if not completely frustrate the employment of ‘Highly Qualified’ teachers” because, for labor certification, teachers “require only a bachelor’s degree,” which “would not meet the objective of the employer to hire highly qualified teachers pursuant to No Child Left Behind.” Counsel likewise asserted that the labor certification process cannot take into account the petitioner’s “over 17 years of experience.” Section 9101(23) of the NCLBA defines the term “highly qualified teacher.” One of the criteria for that designation is that the teacher “holds at least a bachelor’s degree.” The statute also makes it clear that a “teacher who is new to the profession” can be “highly qualified.” Therefore, the wording of the statute does not support counsel’s implied claim that the NCLBA mandates the hiring of experienced teachers with advanced degrees. Counsel submitted no evidence to show that the labor certification process has systematically prevented or impeded the hiring of “highly qualified teachers.” The characterization of the labor certification process as “tedious” is beside the point. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *NYSDOT*, 22 I&N Dec. 223.

Counsel stated that another [redacted] teacher received a national interest waiver, and asked that the present petition “be treated in the same light.” While AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished service center decisions are not similarly binding. (In the case of a service center approval, there exists no written decision.) Furthermore, counsel provided no evidence to establish that the facts of the instant petition are similar to those in the unpublished decision. Without such evidence, the assertion that both cases merit the same outcome is unwarranted. The only stated similarity is that the beneficiary of the approved petition is “also a teacher.” Even assuming that the service center correctly approved that petition, the approval does not, in any way, endorse or lend weight to the assertion that [redacted] teachers are collectively entitled to a blanket waiver of the job offer/labor certification requirement.

The director denied the petition on January 10, 2013. The director stated: “Eligibility for the waiver must rest with the beneficiary’s own qualifications rather than with the position sought. . . . A petitioner must demonstrate that the beneficiary has a past history of achievement with some degree of influence on the field as a whole.” The director listed the petitioner’s submissions, and stated: “Her achievements have impacted her current and past employers. However, the evidence does not establish that her past history of achievement had some degree of influence on her field as a whole.” The director added that “the ‘No Child Left Behind Act’ . . . does not apply to Immigration Law,” and that the approval of one petition does not mandate the approval of petitions with roughly similar fact patterns.

On appeal, the petitioner submits a brief in which counsel repeats many of the assertions already addressed above in the context of the request for evidence. For instance, counsel repeats the assertion that, by passing the NCLBA, Congress provided guidance that was absent at the time of *NYSDOT*’s publication. Counsel states:

With respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: “Visas shall be made available . . . to qualified immigrants who are members

of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the **national . . . educational interests**, . . . of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.”

Counsel, above, highlighted the phrase “national educational interests,” but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien’s “services . . . are sought by an employer in the United States.” Counsel has, thus, directly quoted the statute that supports the director’s conclusion. By the plain wording of the statute that counsel quotes on appeal, an alien professional holding an advanced degree is presumptively subject to the job offer requirement, even if that alien “will substantially benefit prospectively the national . . . educational interests . . . of the United States.” Neither the Immigration and Nationality Act nor the No Child Left Behind Act, separately or in combination, create or imply any blanket waiver for teachers.

Counsel contends that *NYSDOT* “is obviously good in so far as NIW cases filed by Engineers are concerned but does not give justice to other professionals especially since the facts are definitely distinct from each other, not to mention subsequent legislations intended to provide guiding principles to implement [the] Immigration Act of 1990.” Counsel did not identify any “subsequent legislations.” Counsel fails to support the assertion that *NYSDOT* applies only to engineers. While that specific decision happened to involve an engineer, the three-pronged national interest test was not narrowly focused on engineers. It may be that the waiver is not easily obtained by teachers, but this does not prove that the *NYSDOT* formula is fatally flawed; counsel has made no persuasive assertion that Congress intended the waiver as a means for large numbers of teachers to avoid the job offer requirement (including labor certification).

Counsel asserts that a key goal of the NCLBA was “closing the achievement gap,” but counsel presents no evidence that the petitioner has made progress in closing that gap on a scale significant enough to meet the *NYSDOT* standards. The assertion that the petitioner has “proven success in raising proficiency of his [*sic*] students” does not show wider success outside her own classroom. The assertion that “[a]s a teacher of Mathematics, [the petitioner] plays a primary role in accomplishing the law’s goal of closing the achievement gap in the core area of Math” applies to all qualified math teachers, and does not single out the petitioner for a waiver that, by design, relies on individual circumstances rather than the overall importance of a particular profession.

Counsel asserts that the Teach For America program, which recruited new college graduates to teach in disadvantaged areas, has produced disappointing results. It is a false dichotomy, however, to imply as counsel does that the only two solutions to the education crisis are Teach For America or a blanket waiver for “Highly Qualified Teachers.”

As is clear from a plain reading of the statute, engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest. Congress has not established any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather on the merits of the individual alien.

On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.